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ON CONSTRUING STATUTES BY EQUITY.[1]

From the time of Aristotle, as we know by his writings yet extant, and probably from a period more ancient, down almost to this moment, it has been the concurring opinion of all philosophers and lawyers who have delivered their sentiments upon the subject, and a settled doctrine in the jurisprudence of every civilized community, that positive laws or legislative enactments (except such as are penal, about which there has been some contrariety,) should be construed by equity: The meaning of which is, not that the courts or any class of them, in dealing with any such law, should exercise, or would be justified in asserting, an equitable control over the known intention of the lawgiver; but only that, in the process of ascertaining what *is* his intention, the spirit rather than the letter of his enactments should be regarded. Arist. Rhet. lib. 1, c. 13; Ethic. Nicom. lib. 5, c. 10; Grot. de Jure Bell. & Pac. lib. 2, c. 16, sec. 26; c. 20, sect. 27; de Aequitate, sect. 12; de Indulgentia, sect. 4; Puffend. de Jure Nat. & Gent. lib. 1, c. 6, sect. 17; lib. 5, c. 12, sect. 21; de Off. Hom. & Civ. lib. 1, c. 2, sect. 10; Elem. Jur. Univ. lib 1, sect. 22, 23; Tayl. Elem. Civ. Law, 3d edit., pp. 90–98; Ashe's Epieikeia, Introd.[2]

[1] Quarterly Law Journal for April, 1858, pp. 150–166.

[2] It is a common opinion, (Plowd. 465–466, note to *Eyston* vs. *Studd;* Bac. Abr. tit. Statute, I. 6; Woodd. Syst. View, lect. 7, pp. 192–193, 1st edit.) countenanced

Blackstone has set this matter in a clear and strong light, in a passage of his Commentaries, which is repeated by Tucker *verbatim*, and, with no material alteration, by Stephen and by Story. His words are: "It is said that a court of equity determines according to the spirit of the rule, and not according to the strictness of the letter. But so also does a court of law. Both, for instance, are equally bound, and equally profess, to interpret statutes according to the true intent of the legislature. In general laws all cases cannot be foreseen, or, if foreseen, cannot be expressed: some will arise that will fall within the meaning, though not within the words of the legislator; and others, which may fall within the letter, may be contrary to his meaning, though not expressly excepted. These cases, thus out of the letter, are often said to be within the equity of an act of parliament; and so cases within the letter are frequently out of the equity. Here, by *equity*, we mean nothing but the sound interpretation of the law;" *not* that the courts of equity (so called) are more trusted or more obliged, than courts of law, to give effect to such an interpretation. "Each endeavors to fix and

by many great and venerable names, that Aristotle, in the Nicomachaean Ethics, as well as in his Rhetoric, speaks of judicial equity, known in his time to the courts, and applied by them in their administration of law. We defer respectfully to that opinion, but must confess that we do not concur in it; for, as it strikes us, what he says in the first mentioned of those works, describes a moral virtue, which no courts could have ever enforced, and by which its possessor, from considerations of enlarged justice—a justice beyond the law—yields voluntarily something which, if he demanded it, or resisted a demand for it, the courts would and must adjudicate in his favor. This remark, however, is of no moment to the matter at present in hand, inasmuch as there can exist no doubt that the same author, in his other work, above mentioned, does speak of the kind of equity discussed in this article; and if he did not, a *sufficient* antiquity for it would be discoverable from other sources; as may be seen in this learned Introduction of Ashe, and in the article on equity to which we refer in Taylor's Elements of the Civil Law. But the remark naturally suggests another of more consequence; that it is to be regretted, we should have only one and the same word for denoting three things so different, as the two *species* or rather *genera* of equity here noticed, and that other, which in modern times, in England and in America, has become so much more conspicuous than either, and which is distinguished from both, better perhaps than anywhere else, in the first chapter of Story's Equity Jurisprudence.

adopt the true sense of the law in question; neither can enlarge, diminish, or alter that sense in a single tittle." 3 Black. Com. 430–1; Tuck. Comm. B. 3, ch. 21, p. 388, edit. 1837; 4 Steph. Com. 2–3; Stor. Eq. Juris. sect. 15. See, also, 1 Woodd. Syst. View, lect. 7, pp. 192–199, 1st edit.

"In this sense, equity," says Story, (*Equity Juris.* sect. 7,) "must have a place in every rational system of jurisprudence." Yet its ejection out of our own has been attempted.

This attempt is made by Mr. Sedgwick, in his copious, elaborate, and learned treatise *On the Interpretation and Application of Statutory and Constitutional Law*, which appeared during the last year. He, as we understand him, distributes *quoad hoc* all statutes into two principal classes; one consisting of those, in which the language is clear and plain to such a degree that no two competent judges of mere language could differ about its meaning; the other of those, in which the language is obscure or ambiguous: and this latter class he subdivides into, first, those in which, by the help of what he calls legitimate aids, enumerated in his sixth chapter, a determinate meaning is capable of being affixed to the words used; and secondly, those in which no such meaning can be, through any such help, wrought out. In cases falling within the latter of these subdivisions, (pp. 259, 264, 291, 293–294, 311–312, 379–380,) he ascribes to the judiciary a *quasi*-legislative power, to make a rule where some rule must be applied, and the legislature have, in their attempt at framing one, failed; in all other cases of this class, (pp. 230, 235, 258, 294,) he regards the courts as properly fulfilling the office of interpreters and expositors of the law: but in cases of the first class, (pp. 231–232, 235, 295–296, 305–310, 379,) he considers that always, (at least in modern times, and in America, more especially,) where they have applied the doctrine of equitable construction, so as to go one tittle beyond, or to stop one tittle short, of the exact letter of the statute, they have been usurpers of power that did not of right belong to them.

With regard to this last point, which alone we propose at this time to consider, we differ widely from Mr. Sedgwick; as to the ground of his doctrine, utterly; perhaps, as to the results of it, not

toto cælo. He himself confesses, that herein he stands opposed to, not only the whole body of the Civil Law and civilians, the best writers, if not all writers, on general jurisprudence, and the whole body of the early and mediæval Common Law and writers upon it, but also numerous very modern decisions of the courts on both sides of the Atlantic. Of these he cites many, and declares that the number might easily be increased; but he pronounces them all unsound. Pp. 296–306. In contending with one who takes such ground, it seems to be to no purpose to display the vast multitude of decisions which have been made expressly contrary to his doctrine before the time of its being promulgated,—his book is so very recent that probably none can be found since,—yet we cannot refrain from pointing attention to the volume of Ashe, entitled *Epieikeia*, published in 1609; in which mere references to those passages in the few English law-books then extant, which contain authorities establishing the construction of particular statutes by equity, fill two hundred and fifteen numbered *leaves*, or four hundred and thirty pages,—sustaining almost to the letter the statements of Plowden, in his note appended to the report of *Eyston* vs. *Studd*, (Plowd. 465–467,) that "the sages of our law, who have had the exposition of our acts of parliament, have in cases *almost infinite* restrained the generality of the letter of the law by equity, which seems to be a necessary ingredient in the exposition of all laws," and that "there are an *infinite* number of cases in our law, which are in equal degree with others provided for by statutes, and are taken by equity within the meaning of those statutes."[1] It is upon principle, against all such authority, that the standard of revolt is now reared; and upon *principle* we will discuss the new doctrine, in favor of which it is thus endeavored to displace the old.

[1] Ashe, in his Introduction, makes the same division of equity, giving several definitions of each of the two kinds; and in fol. 172*b*–209*b*, he collects references to examples of the restraining kind, under the heading: '*Equitie incounter la letter. Ou et in queux statutes le generality des parols serra restraine per construction fait per equitie, et exposition fait sur iceuse encounter la luter et les parols mesmes.*' His examples of enlarging equity are even much more numerous, and are methodically distributed under no less than eighteen different heads.

As introductory to such discussion, it seems expedient to present a more complete analysis and exposition, than has yet been offered, of the latter. The kind of equity, then, which we are considering, is conversant about determining what cases come within the operation of a particular statute, and what is its operation in them; and it either enlarges beyond the letter, or restrains within limits less extensive than it, the scope of the statute, or its operation, or both. Thus, it may not be possible, in point of grammatical construction, to make the words of a statute extend so far as to comprehend certain cases, or to produce a certain effect to the cases they do comprehend; yet it may seem, that such cases outside of the letter ought to have the same rule applied to them, as is applied to cases that are within it, and also that such effect is necessary for accomplishing the design of the legislature: Or, it may be that the language is so general as to comprehend a variety of cases materially distinguishable in their circumstances, perhaps even contrasted, or to produce an effect beyond what the design of the legislature calls for; and then it may seem, that some of the cases so comprehended ought not to be within the operation of the statute at all; or that its operation ought to be less extensive than the full latitude of its words. Now, between that equity which, on the one hand, enlarges the range of the statute or its efficacy within its true range, and that which, on the other, restricts either, there is this observable difference: All men, knowing what it is they do contemplate, are apt to use words which are large enough to embrace it; but all men, being unconscious necessarily of what they do not contemplate, are liable to employ general words that (literally taken) have a sense more comprehensive than is suited to their present design. Hence, to say that a law does mean something not expressed in it, is a stronger measure than to say that its general phraseology comprehends not only all which it was intended to mean, but also something not thought of or *de facto* contemplated in making it. In other words, it is less natural to suppose that the legislator has left out some case, which was in his contemplation, and for which he did intend to provide, or has omitted some part of the provision

he had meditated, and did design making; than that, from an incautious or unskillful use of general language, he has included in the letter, cases which never were in his contemplation, or has given to the provision he designed making an amplitude beyond what he ever intended. *Restraining* equity, therefore, is only a candid interpretation of the lawgiver's language; and merely says, that his words shall operate so far and no further, because he did not mean all they are capable of expressing, *dixit sed non voluit. Enlarging* equity, on the other hand, lies open to the objection, at least plausible, that presumably the legislator did not mean more than he has said, and at any rate, if he meant more, he has not said it, *voluit sed non dixit;* whereas statute law must consist of both the intention and the expression. And thus it, at least, may be said, that while restraining equity is proper, because it merely neutralizes the expression where the intention is absent, enlarging equity can be nothing else than judicial legislation, because it enforces as law that which lacks the requisite expression, if (even) the intention be not also wanting.

Plowden, in his note before mentioned, after dividing equity into two kinds, and giving a definition and numerous examples of the restraining sort, says "the other kind of equity differs much from the former, and is, in a manner, of a quite *contrary* effect;" and then he defines and exemplifies enlarging equity, in such manner as to show that "cases which are in equal degree with others provided for by statutes, are taken by equity within the meaning of those statutes." We believe that this is the view which has been generally, perhaps universally, taken of such cases, conformably with the *decantatum*, that "a thing which is within the intention of the makers of a statute, is as much within the statute as if it were within the letter." Bac. Abr. tit. Statute, I, 5; Dwarr. Stat. 691, 1st ed.; 15 Missouri Rep. 519, *Riddick* vs. *Walsh*. It seems, however, to be of little practical importance, whether in these cases the statute operates directly, or by analogy, in like manner as courts of equity, when not bound by statutes of limitation, have nevertheless applied them where the circumstances were such as that they would have

been applicable in a court of law. Since, either way, the same end is accomplished, and that natural love of justice in the human heart is satisfied, which so vividly responds to the appeal, "*valeat aequitas, quæ paribus in causis paria jura desiderat,*" (Cic. Top. sect. 4;—Bract. lib. 1, c. 4, sect. 5, fol. 3 *a;* Co. Litt. 24*b*,) and to the more homely law maxim, *ubi eadem ratio ibi idem jus.*

These considerations do not apply to the other species of enlarging equity, relative to the operation of a statute in cases that come within it. That species, indeed, we feel (perhaps as much as half,) inclined to surrender to the condemnation of Mr Sedgwick—not, however, upon his ground, but upon the ground which we have indicated before; and therefore it is with reference only to restraining equity, that from this point the discussion will be carried on. This we cannot give up to him.

He condemns and rejects promiscuously all the kinds and species we have been taking pains to distinguish, at least wherever the language of a statute is plain, upon the broad ground that the courts can in no case depart from what is *so* written; because (as we understand his reasoning) the principles of civil freedom, as now understood in England and here, and the very terms of our fundamental laws in most or all of the States of this Union, require that the legislative and judicial departments of government shall be distinct, and that neither of them shall exercise the functions of the other. But it seems difficult, and to us is impossible, to conceive how the courts can be more guilty of usurping power that does not belong to them, or how they can be properly said to contain themselves within their own province less, when they diligently seek, and faithfully (to the best of their judgment) execute, the lawmakers' intention, in cases which, according to that distribution of statutes we have heretofore ascribed to Mr. Sedgwick, fall within the first class, than when they do the like in cases that fall within either subdivision of the second. On the contrary, we hold with Blackstone, Tucker, Stephen, Story, that in *all* cases it is the duty of a judge "to endeavor to fix and adopt the *true sense* of the law in question, not enlarging, diminishing or altering *that sense* in a single tittle;" and with Puffendorf, (de Jure Nat. & Gent. lib. 1, c. 6,

sect. 17,) Taylor, (Elem. Civ. Law, 3d edit., p. 97,) and a host besides, that this equity is not of grace, but of right, not of favor, but of justice, and that the judge who follows the letter, when he ought to decide according to the spirit, does not less violate the law than he who sets himself above it, and distinguishes where that, rightly understood, has not distinguished. Indeed, Mr. Sedgwick himself repeatedly (pp. 229, 231, 232, 235, 259, 291, 294, 295, &c., &c.,) lays it down, that in construing a statute the object to be sought is the intention of the legislature; and therefore the controversy between us seems to be narrowed to the question, whether that intention can be less extensive than the language of the statute, where the language is plain—or, to put it in the form most favorable to him, whether it can be sufficiently known to be so. He maintains the negative, (pp. 306–307,) we the affirmative.

On an issue like this the appeal must be to common sense; and therefore, without calling any of the multitudinous witnesses in our favor, as all those are who have made the decisions of this kind reprobated by Mr. Sedgwick, or have maintained a similar doctrine, we bring the matter at once to that standard. A statute ordains, that if a prisoner confined upon a charge of felony break prison, that shall make him a felon; a prison takes fire, and such a prisoner breaks it to save his life, (Plowd. 13, arg. in *Reniger* vs. *Fogossa;* another statute ordains, that whoever shall do a certain act, shall be a felon and suffer death; a madman, or an infant not yet *doli capax*, does the act, (Plowd. 465, note to *Eyston* vs. *Studd;*)—in these cases is the prisoner, the madman, or the infant, a felon within the meaning of the respective statutes? We suppose that there can be but one answer. Bac. Abr. tit. Statute, I. 6. And if in these extreme cases the issue must be decided in our favor, that settles the principle. In other cases it may be more dubious, whether the legislature *have* meant all, or less than all, that is said, but the possibility that they *may* have used words capable of meaning more than they meant, and that this *may* be satisfactorily shown, cannot, after the preceding instances, be successfully negated.

We think that on this point Mr. Sedgwick is in error, and that the source of his error may be detected by means of what he lays

down in p. 230 of his volume. He there says, that in discharging the duty of construing a statute, "the first thing is to have a clear idea of the object in view. What is doubtful? The answer evidently is, the intent of the legislature who passed the act. What did the legislature in fact intend? The doubt does not refer to the *policy* of the act; for with that, as we have seen, the judges have nothing to do. They are judges, and not law-makers. Nor does the doubt regard the *motive* of the legislator, for over that the judges have no right of control." And from thus compelling them to ignore all that goes to make up the spirit of the statute, it follows necessarily that he must confine them to the mere letter of the law, wherever that can afford any certain rule of decision.

Now, we agree with him, that in one sense the judges have nothing to do with the policy of the act. They are (ordinarily) not to judge the law, but to judge by it; "*non de legibus judicare, sed secundum ipsas*," in the words of the quotation from St. Augustine, with which (p. 228, n.,) Mr. Sedgwick favors us. They are, accordingly, not to say that the policy of the statute is good, and therefore they will enlarge its operation; or bad, and therefore they will narrow it; agreeably to the opinions which in another place (p. 308,) he has collected. And for precisely the same reason they cannot control the motive. But it is the business of every expositor of a statute to ascertain what in point of fact is the policy, what the motive; in order that the construction which he shall adopt may be neither repugnant to, nor discrepant from, either, but in harmony with both. And this is the course which in a vast majority of instances, if not in all, has been pursued from the earliest dawn of judicature among our ancestors down to a very recent period, if not absolutely to the present time, among their descendants both in England and in America. What else mean those appeals which are now being constantly made, by the judges in our highest State tribunal, when engaged in construing our Virginia Code of 1849, to the reports of the revisors upon which it was founded?

For the reasons which have been thus shortly and imperfectly stated, we should think that, upon principle, if the matter were *res*

integra, the doctrine thus handed down to us *ab antiquo* is that which ought still to prevail. But upon the ground of authority the question is most important, if it can be regarded as a question at all, whether the courts are at liberty now to discard it in favor of even a better. Are they not under the same obligation in this matter, as in others, *stare decisis?* And is not the rule of interpretation, according to which statutes have been construed in innumerable cases heretofore, to be considered as a thing *decided* in every one of those cases? Moreover, is it not due to the legislature to suppose, that they rely upon having their words interpreted with the same candor, construed with the same equity, that has always heretofore been applied under like circumstances? And, upon all these considerations combined, if the judges are to wheel—(military men, we believe, call it *facing*)—short to the right about, ought they not to wait for a signal in the shape of some fresh constitutional provision,—more especially seeing with what ease and rapidity constitutions in our day chase one another across the stage,—instead of performing that evolution at the word of command of a text-writer, or (worse still) *sua sponte?*

In the remainder of this article we shall advert to some of the most recent authorities, not mentioned by Mr. Sedgwick, that are favorable to our view; and then notice those which he cites as adverse to it.

In January, 1855 a case (*Hawkins* vs. *Gathercole*, 31 Engl. L. & E. Rep. 205,) was decided by the Lords Justices in England, who concurred in holding, that a subject matter confessedly within the words of a *modern* statute, made in the reign of Victoria, was not within its operation; and upon that occasion one of them, Sir George James Turner, used these expressions: "That [the particular subject matter in dispute is] within the words of the act, if literally construed, cannot of course be disputed, but in construing acts of parliament the words which are used are not alone to be regarded; regard must also be had to the intent and meaning of the legislature. The rule upon this subject is well expressed in the case of *Stradling* vs. *Morgan*, in Plowden's Reports, in which case it is said, at p. 204, 'The judges of the law in all times past have

so far pursued the intent of the makers of statutes, that they have expounded acts which were general in words, to be but particular where the intent was particular.' And after referring to several cases, the report contains the following remarkable passage at p. 205: 'From which cases it appears that the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter, they have expounded to extend but to some things, and those which generally prohibit all people from doing such an act, they have interpreted to permit some people to do it, and those which include every person in the letter, they have adjudged to reach to some persons only; which expositions have always been founded upon the intent of the legislature, which they have collected sometimes by considering the cause and the necessity of making the act, sometimes by comparing one part of the act with another, and sometimes by foreign circumstances. So that they have ever been guided by the intent of the legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion.' The same doctrine is to be found in *Eyston* vs. *Studd*, in the same reports, p. 465, and the note appended to it, and many other cases. The passages to which I have referred, I have selected as containing *the best summary with which I am acquainted* of the law upon this subject. In determining the question before us we have, therefore, to consider not merely the words of the act of parliament, but the intent of the legislature to be collected from the cause and necessity of the act being made; from a comparison of its several parts; and from foreign meaning [matter] and extraneous circumstances, so far as they can justly be considered to throw any light upon the subject." And in a later case, (*Crofts* vs. *Middleton*, 35 Eng. L. & E. Rep. 466, decided in March, 1856,) the same passage from *Stradling* vs. *Morgan*, was incorporated into a very learned judgment of the other Lord Justice, Sir James Lewis Knight Bruce; who took occasion to copiously illustrate a proposition he then advanced, and which he had some three years before advanced in another case, (*Key* vs. *Key*, 19 Eng. L. & E. Rep. 624,)—"*leges non ex verbis, sed ex mente, intelligendas.*"

In like manner, it was said by one of the greatest of our American judges, Chief Justice Shaw, of Massachusetts, in June, 1834, (15 Pick. 393, 402, *Brown* vs. *Thorndike:*) "Without at present stopping to state the rules of construction, which are familiar and uncontested, and which mostly result in considering the various means by which the intent of the Legislature, in the act they have made, can be discovered, it is well established that in the construction of remedial statutes, [by which we understand, in such connection, all that are not penal,] cases not within the letter of the statute are taken to be within its spirit and equity, upon a reasonable certainty, arising from consideration of the statute, and of every part and clause of it, and from the obvious end and purpose to be accomplished by it, that it was so intended by the Legislature; and also, that a case may come within the letter, which shall not be judicially constructed to be within the act, because it is like manifest, to a reasonable certainty, that it was not so intended by the makers of the act." And accordingly the following, among very many other equally strong decisions, have been made under our *republican* constitutions.

Where the words of a statute gave to a court equitable jurisdiction in "all cases of trust arising under deeds, wills, or in the settlement of estates," it was nevertheless held, upon general reasoning as to the spirit and policy of the statute, that the jurisdiction so given extended only to express trusts arising from the written contracts of the decedent, and not to those implied by law, or growing out of the official character or situation of his executor or administrator. 5 Greenl. 303, *Given* vs. *Simpson*. So, upon a statute enacting, that "any child or children, or their legal representatives in case of their death, not having a legacy given him, her, or them in the last will of their father or mother, shall have a proportion of the estate of their parents assigned unto him, her, or them, as though said parent had died intestate; provided such child, children, or grandchildren have not had an equal proportion of the deceased's estate bestowed on him, her, or them in the deceased's lifetime," it has been settled by repeated decisions, that in order to exclude an unadvanced child or other descendant from a distributive share of

the testator's estate, it is not necessary that such child or descendant should have anything given him or her by the will, but it is sufficient, if it appears from the will, by such child or descendant being named therein, (1 Mass. Rep. 146, *Terry* vs. *Foster;* 2 Mass. Rep. 570, *Wild* vs. *Brewer;* 3 Mass. Rep. 17, *Church* vs. *Crocker;*) or by any other sufficient indication, (14 Mass. Rep. 357, *Wilder* vs. *Goss;* 2 N. Hampsh. Rep. 499, *Merrill* vs. *Sanborn,*) that he or she was not forgotten by the testator at the time of his making it. 18 Picker. 166, 167, *Tucker* vs. *Boston.* So, finally, not to multiply, as we might easily, citations of this sort *usque ad nauseam*, upon statutes enacting that "no bargain, sale, mortgage, or other conveyance of houses or lands, shall be good and effectual in law to hold such houses or lands against any other person or persons but the grantor or grantors and their heirs only, unless the deed or deeds thereof be acknowledged and recorded;" or that "no conveyance of a freehold in or lease for a longer term than seven years of any land, shall be good and effectual in law to hold such land against any person but the grantor and his heirs, unless the deed of conveyance be acknowledged and recorded, (3 Mass. Rep. 573, 583, supplement; 2 Mass. Rep. 508, *Norcoss* vs. *Widgery;* 4 Mass. Rep. 545, 546, *Pidge* vs. *Tyler;* 637, *Farnsworth* vs. *Childs;* 5 Mass. Rep, 450, 457–459, 469–477, *Dudley* vs. *Summer;* 6 Mass. Rep. 29–30, *Marshall* vs. *Fisk;* 487, *Davis* vs. *Blunt;* 10 Mass. Rep. 61, *Prescott* vs. *Heard;* 407–408, *Commonwealth* vs. *Dudley;* 11 Mass. Rep. 158–159, *Brown* vs. *Maine Bank*; 14 Mass. Rep. 300, *Connecticut* vs *Bradish;* 1 Pick. 164, *Priest* vs. *Rice;* 3 Pick. 152–153, *McMechan* vs. *Griffing;* 4 Greenl. 20, 26–27, *Porter* vs. *Cole;* 8 Greenl. 99–100, *Hewes* vs. *Wiswell*;) or that "every deed not recorded shall be adjudged fraudulent and void against a subsequent purchaser for a valuable consideration, whose deed shall be recorded," (10 Johns. Rep. 457, *Jackson* vs. *Burgott;* 17 Wend. 25, *Van Rensselaer* vs. *Clark;*) or that "all deeds, relating to" certain descriptions of land, shall be deemed "fraudulent and void against a subsequent purchaser for a valuable consideration, unless first recorded," (9 Johns. Rep. 163, *Jackson* vs. *Sharp;*) or that "all leases of" certain other descriptions of real estate, "and all

transfers thereof, shall be recorded within twenty-four hours after the execution thereof, at the expense of the lessee or assignee, and in default thereof shall be void," (10 Johns. Rep. 466, *Jackson* vs. *West*;) it has been held, in Massachusetts, Maine and New York, that such deeds unrecorded are, as against the grantors and subsequent purchasers from them with notice, in *all* respects and in *all* courts as valid as if they had been duly recorded. See also in Pennsylvania, 1 Dall. 430, *Levinz* vs. *Will*; 4 Dall. 153, *Stroud* vs. *Lockhart*; 4 Binney 140, 146, *Correy* vs. *Caxton*; 7 Watts, 261, *Jacques* vs. *Weeks*; 7 Watts & Serg. 335, *The Manuf. & Mechan. Bank* vs. *The Bank of Pennsylvania*; 5 Barr, 473, *Solons* vs. *McCullough*. And here it may be remarked, as somewhat curious, that Mr. Sedgwick has ignored all these decisions, though several of them were in his own State, in that part of his book, (pp. 320–321) where he notices a contrary decision of the court of King's Bench, in England, (5 Barn. & Ald. 142, *Doe* vs. *Allsop*,) upon similar words of a statute there; a decision, too, which possibly would not have been made, if it had not been settled long before in regard to that very statute, that a court of equity would uphold the first deed, though unregistered, against such a subsequent purchaser. 4 Bro. P. C. 2nd edit., 189–190, *Forbes* vs. *Doniston*; 1 Stra. 664, *Cheval* vs. *Nichols*; 2 Eq. Abr. 63, S. C.; 1 Eq. Abr. 358, *Blades* vs. *Blades*; 357–358, *Beatniff* vs. *Smith*; 3 Atk. 646, *Le Neve* vs. *Le Neve*; 1 Ves. Sen. 64; Ambl. 436; 2 White & Tud. Lead. Eq. Cas. 21, S. C.; Ambl. 624, *Sheldon* vs. *Cox*; 2 Eden 224, S. C.; 1 Burr. 474, *Worseley* vs. *De Mattos*; 2 Ld. Keny. 226, S. C.; Cowp. 712, *Doe* vs. *Routledge*; 2 Ridgew. P. C. 345, 428–429, *Chandos* vs. *Brownlow*; 1 Scho. & Lefr. 98–100, *Bushell* vs. *Bushell*; 1 Ball & Beat. 290, 301–303, *Eyre* vs. *Dolphin*.

On the other hand he has collected (pp. 231, 243–247, 260–261, 307–311,) some decisions and more *dicta*, which, as stated by him, seem to have a tendency towards his side of the question. These it was not necessary, with his views—which we have already noticed as blending promiscuously the different kinds and species of equity—to reduce under any collocation or arrangement, having reference

to those several kinds and species; but we shall endeavor to marshal them in an order more suitable to the present discussion. And, first, of those which concern restraining equity: The cases he cites, in which unavailing attempts have been made at applying it, are (in his order of mentioning them) *Bosley* vs. *Mattingly*, 14 B. Mon. 89; *Fisher* vs. *Blight*, 2 Cranch 358; *Case* vs. *Wildridge*, 4 Indiana Rep. 51; *Notley* vs. *Buck*, 8 Barn. & Cr. 467; *Rex* vs. *Stoke Damerel*, 7 Barn. & Cr. 563; *Rex* vs. *Ramsgate*, 6 Barn. & Cr. 712; *Rex* vs. *Baryam*, 8 Barn. & Cr. 99; *Green* vs. *Wood*, 7 Ad. & Ell. N. S. 178; *Rex* vs. *Burrell*, 12 Ad. & Ell. 460; *Lamond* vs. *Eiffe*, 3 Ad. & Ell. N. S. 910; *Everett* vs. *Wells*, 2 Scott's N. R. 526; *Newell* vs. *The People*, 3 Seld. 9; *Bidwell* vs. *Whitaker*, 1 Michig. Rep. 469; *Commonwealth* vs. *Kimball*, 24 Pick. 370; *McIver* vs. *Ragan*, 2 Wheat. 25; *Moss* vs. *Commissioners of Sewers*, 4 Ell. & Bl. 670; *Putnam* vs. *Longley*, 11 Pick. 487; *Gore* vs. *Brazier*, 3 Mass. Rep. 523; *Langdon* vs. *Potter*, 3 Mass. Rep. 215; *Priestman* vs. *The United States*, 4 Dall. 28–30, n.; and upon a careful examination of them all, we are prepared to make and maintain the assertion, that there is not one of the whole number, in which the decision conflicts at all with the principle already stated, as that which seems to us to be sound. In many the attempt was preposterous; in the rest unsustainable, because there did not (though sometimes a dissenting judge thought there did) exist any sufficient reason for supposing, that the legislature had not meant precisely what it had said. Of course, we *can* not, within our necessary limits, exibit even a brief analysis of *each* of these cases, and therefore we *shall* not in regard to *any;* but we must notice some of the more remarkable *dicta* which Mr. Sedgwick has extracted from them: premising the rather obvious general remark, that where occasion does not require a judge to define accurately the position he lays down *obiter*, it is easy for him to fall into some carelessness of expression; and another general remark as important, and hardly less obvious—which will receive an immediate illustration—that even good reporters cannot be trusted implicitly to give ns the very words or the precise sense of what does so fall from the judges.

Mr. Sedgwick (p. 246) tells us, from Scott's report of *Everett* vs. *Wells*, that Tindal, C. J., therein said: "It is the duty of all courts to confine themselves to the words of the legislature, nothing adding thereto, nothing diminishing." But we can find, in the report of the same case by Manning and Granger, (vol. 2, pp. 269–279,) no trace of such a *dictum*, but this: "It is our duty neither to add to nor take from a statute, unless we see good grounds for thinking that the legislature intended something which it has failed precisely to express."

In another place (p. 308) he quotes Chief Justice Shaw as saying, "The decisive answer is, that the legislature has made no such exception. If the law is more restricted [restrictive] in its present form than the legislature intended, it must be regulated by legislative action." But in the report at large of the case, (*Commonwealth* vs. *Kimball*, 24 Pick. 366,) which related to an unlicensed sale of spirituous liquor, attempted to be taken out of the operation of a statute prohibiting it, on the ground that it was sold to be used as medicine, we find, between the two sentences culled and juxtaposited by Mr. Sedgwick, the following: "It does not allude to the object or purpose for which it is bought. Nor is it reasonable to imply any such exception, because, having provided that it should be lawful to sell spirits in a certain mode, there was no occasion for making an exception; and such exception would lead to evasion and abuse. It might be bought for one purpose, and used for any and every other; and the danger to be apprehended from the abuse of it would require restriction and regulation, as well in one case as the other." Corrected thus, and still more if read with the entire context from which it is torn, the quotation will no longer have the appearance, which it otherwise has, of making the truly learned and able Chief Justice throw some discredit on a doctrine which (as we have pointed out) he had himself advanced not long before.

In another place (pp. 310–311) he quotes "the Supreme Court of the United States" as *saying* what was only said (if said in those words at all) by Judge Chase, in the Circuit Court, whence the case afterwards came into the Supreme Court: and in the latter nothing of the kind was uttered, but the case was decided upon a ground that

would have made any such *dictum* most gratuitous. 4 Dall. 28–34; *Priestman* vs. *The United States*; 31, note 1, *S. C.* in the Circuit Court.

With like want of accurate statement, he tells us, (p. 231,) "it is said by the Supreme Court U. S.: 'Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction;'" whereas these are the words of Judge Washington, (9 Cranch, 399, *Fisher* vs. *Blight*, 1 Wash. C. C. Rep. 7, *S. C.*,) in a *dissenting* opinion—he standing alone against the rest of the court. Moreover, in the next sentence following these words, he says: "But if, from a view of the whole law, or from other laws *in pari materia*, the evident intention is different from the literal import of the terms employed to express it in a particular part of the law, that intention should prevail, for that in fact is the view of the legislature." A little further on, he says: "If the literal expressions of the law would lead to absurd, unjust or inconvenient consequences, such a construction should be given as to avoid such consequences, if from the whole purview of the law, and giving effect to the words used, it may fairly be done." And from the sequel of his opinion it appear plainly, that by *giving effect* he meant giving *some*, not *full*, effect. In the cases cited by Mr. Sedgwick, (p. 231,) from 14 B. Monr. 89, and (p. 247) from 1 Mich. Rep. 469, as the words were susceptible of "but one interpretation,"—"but one construction,"—it was necessary to give that construction, in order that they might have *any* effect.

Lastly (under this head) he tells us, (p. 260,) "in an early case, (5 Rep. 118, *b. Edrich's* case,) the judges said, 'They ought not to make any construction against the express letter of the statute, for nothing can so express the meaning of the makers of an act as their own direct words; *index animi sermo*.'" But in the original is immediately added: "And it would be dangerous to give scope to make a construction in any case against the express words, *when* the meaning of the makers doth not appear to the contrary, *and when* no inconvenience will thereupon follow: and therefore in *such* cases

a verbis legis non est recedendum." Which brings that passage of Sir Edward Coke's writings, (for the *words* of the report are undoubtedly his,) into harmony with the other authorities of that age, and even with the quotation from Lord Wensleydale, formerly Mr. Baron Parke, which (in the same page) Mr. Sedgwick gives us.

The other authorities which he cites in support of his own view relate to enlarging equity; they therefore do not make against us, within the limits to which we have expressly narrowed the present discussion. Indeed, we do not know that we shall differ from him about one species of that kind of equity, when we shall have fully made up our mind respecting it. But this is certain, for the reasons which have been already mentioned, that all authorities which support that equity do necessarily *a fortiori* sustain the kind we have been advocating. And therefore we shall bring this article to a close with a citation of some of the cases of that description to be found in our Virginia reports, purposely confining the range of selection within a period that is recent.

Of this kind seems to be the case of *The Bank of the United States* vs. *The Merchants Bank of Baltimore*, 1 Rob. Va. Rep. 573; at any rate, in the opinion which Judge Allen delivered in it, he shows that such are the cases of *Williamson* vs. *Bowie*, 6 Munf. 176, and *Peter* vs. *Butler*, 1 Leigh, 285. Of this kind, also, beyond doubt, is the case of *Green* vs. *Thompson*, upon one point of it, 1 Patt. & H. 427, 458. And so, too, is the case of *The Commonwealth* vs. *Adcock*, 8 Gratt. 661, which being as strong as any that can be conceived, we shall therefore state somewhat at large. A statute (V. C. 1849, ch. 208, sec. 36,) provides that "every person charged with felony and remanded to a superior court for trial, shall be forever discharged from prosecution for the offence, if there be three regular terms of said court, after his examination, without a trial; unless the failure to try him was caused by his insanity, or by the witnesses for the Commonwealth being enticed or kept away, or prevented from attending by sickness or inevitable accident, or by a continuance granted on the motion of the accused, or by reason of his escaping from jail, or failing to appear accord

ing to his recognizance, or of the inability of the jury to agree in their verdict." Adcock, in due time after his being remanded, was indicted, tried, and convicted; but, at his instance, the verdict was set aside for a variance, and, at a subsequent term, a *nolle prosequi* being entered on that indictment, another, for what was really the same offence, was presented and found, upon which being arraigned, he demanded his discharge under the statute; and it was on all hands agreed that, unless its operation was excluded by the proceedings on the former indictment, his demand must be granted. On the question whether such was the effect of the proceedings, the judges of the general court was not unanimous, but all of them, save one, maintained the affirmative. In delivering the opinion of the majority, and after adverting to the position of the prisoner's counsel, that the statute must be literally construed, "*ita lex scripta*," Judge Thompson said: "By adopting the construction contended for, we should in truth be adhering to the letter and sticking in the bark, [Plowd. 467, note to *Eyston* vs. *Studd;* Co. Litt. 54 *b*, 283 *b*, 365 *b*, 381 *b;* Wing. Max. 19–21; Bac. Abr. tit. Statute, I. 5;] we should *violate* the first rules of construction, as much as would he who should decide that the law mentioned by Puffendorf, [*de Jure Nat. & Gent.* lib. 5, c. 12, sect. 3,] which forbade a layman to lay hands on a priest, not only applied to him who hurt a priest with a weapon, but to him who laid hands on him for the purpose of doing him some office of kindness, or rendering him aid and assistance, or that the Bolognian law, mentioned by the same author, [*Ibid.* sect. 8,] which enacted that whoever drew blood in the streets should be punished with the greatest severity, extended to the surgeon who opened the vein of a person who fell down in the street with a fit;[1] or that, in the case put by Cicero, or whoever was the author of the treatise inscribed to Herennius, [lib. 1, c. 11,] cited by Blackstone, [Comm. vol 1, p. 61,] as illustrative of a con-

[1] The words of Puffendorf, in an English dress, are as follows: "At Bolognia it was enacted, that *whosoever drew blood in the streets should be severely punished*, upon which law a barber was indicted for opening a vein in the street, and it had like to have gone hard with him, because it was added in the statute that *the words should be taken precisely, without any interpretation.*"

struction of law by its reason and spirit, the sick man was entitled to the benefit of the law, (upon the vessel's coming safely into port, though his remaining was the result of inability from sickness to escape,) which law provided that those who in a storm forsook the ship should forfeit all property therein, and the ship and lading should belong entirely to those who staid in it." The result of an extended discussion, conducted upon this principle, is stated by him in these words: "The truth is, the statute never meant, by its enumeration of exceptions, or excuses for failure to try, to exclude others of a *similar* nature or *in pari ratione;* but only to enact, if the Commonwealth was in default for three terms without any of the excuses for the failure enumerated in the statute, *or* such *like* excuses, *fairly implicable by the courts from the reason and spirit of the law*, the prisoner should be entitled to his discharge." And thus, in a *criminal* prosecution, a statute made in favor of *liberty* was *restricted* to an operation *within*, by the court's *enlarging* exceptions to it *beyond*, the letter of the law.[1] W. G.

Richmond.

[1] See also 1 Virg. Cas. 319, Thompson's case; 2 Virg. Cas. 74, Lovett's case; 132, 162, Vance's case; 363, Santee's case; all cited and commented on by Judge Thompson, 8 Gratt. 678, 679. And, upon the general subject, besides the authorities collected by our contributor, see 5 Mass. Rep. 380, 382, Pease *vs.* Whitney; 7 Mass. Rep. 523, 524–526, Supplement; 12 Mass. Rep. 383, 384–387, Somerset *vs.* Dighton; 14 Mass. Rep. 92, 93, Whitney *vs.* Whitney; all of which are strong authorities in support of his view. The paper in 7 Mass. Rep. was a response, signed by three of the judges (successively Chief Justices,) to a call of one House of the Legislature, according to a practice common in that State, and it contains these expressions: "The constitution is law, the people having been the legislators; and the several statutes of the Commonwealth, enacted pursuant to the constitution are law, the senators and representatives being the legislators. But the provisions of the constitution, and of any statute, are the *intentions* of the legislature [legislators] thereby manifested. These intentions are to be ascertained by a reasonable construction, resulting from the application of correct maxims, generally acknowledged and received. Two of these maxims we will mention: [1.] That the natural import of the words of any legislative act, according to the common use of them, when applied to the subject matter of the act, is to be considered as expressing the intention of the legislature; unless the intention, so resulting from the ordinary import of the words, be repugnant to sound acknowledged principles of national policy. And [2] if that intention be repugnant to such principles of national

policy, then the import of the words ought to be enlarged or restrained, so that it may comport with those principles; unless the intention of the legislature be clearly and manifestly repugnant to them: For, although it is not to be presumed that a legislature will violate principles of public policy, yet an intention of the legislature repugnant to those principles, clearly, manifestly, and constitutionally expressed, must have the force of law. In consequence of the application of these maxims, similar expressions in different statutes, and sometimes in the same statute, are liable to, and indeed do, receive different constructions, so that the true intent of the legislature may prevail. Now, we assume as an unquestionable principle of sound national policy in this State, that, as the supreme power rests wholly in the citizens, so the exercise of it, or of any branch of it, ought not to be delegated by any but citizens, and only to citizens. It is, therefore, to be presumed that the people in making the constitution, intended that the supreme power of legislation should not be delegated but by citizens. And if the people intended to impart a portion of their political rights to aliens, this intention ought not to be collected from general words, which do not necessarily imply it, but from clear and manifest expressions which are not to be misunderstood. But the words "inhabitants" or "residents" may comprehend aliens, or they may be restrained to such inhabitants or residents who [as] are citizens, according to the subject matter to which they are applied. The latter construction comports with the general design of the constitution." And, after some further reasoning upon the subject, "It may, therefore, seem superflous to declare our opinion, that the authority given to *inhabitants* and *residents* to vote, is restrained to *such* inhabitants and residents as are *citizens*. This construction, given to the constitution, is analogous to that given to several statutes. Creditors may levy their execution on the lands of their debtors, and hold them in fee simple, unless redeemed; although the words of the statute are general, yet they are not deemed to include alien creditors: if they were so deemed, then, under color of a judgment and execution, the rule of the common law, prohibiting an alien from holding lands against the Commonwealth, would be defeated. So a general provision is made for the dower of widows: yet it is not supposed that a woman, who is an alien, can claim, and have assigned to her, dower in the lands of her deceased husband." [See 1 Lom. Dig. 1st edit., 80. For a like illustration upon the Virginia statutes of descents, compare V. L. 1794, 1803, 1814, c. 93; V. C. 1849, c. 123, and see 2 Rand. 276, Barzizas *vs.* Hopkins.] The case in 12 Mass. Rep. turned upon the construction of a statute in these words—"all persons, citizens of this Commonwealth, who, before the 10th day of April, 1767, resided or dwelt within any town or district in the then province of Massachusetts Bay for the space of one year, not having been warned to depart therefrom according to law, shall be deemed and be taken to be inhabitants of the same town or district to every intent and purpose whatever;" and it was held that, comprehensive as they were, they did not embrace the case of a minor, though illegitimate: because the court could "never presume it to have been the intention of the legislature to remove infant children from the custody and protection of their parents," or to separate even bastards, while minors, from their mothers.